

EVART JENSEN, APPELLANT

BUREAU OF LAND MANAGEMENT, APPELLEE

CLYDE L. DORIUS, MORRELL MATHEWS,
EVAN MEMMOTT, NORD MEMMOTT, RALPH LUND,
NOEL ROBBINS, ALAN MATHEWS AND PARLEY IVIE, INTERVENORS

IBLA 73-184

Decided September 26, 1973

Appeal from the decision of Administrative Law Judge Rudolph M. Steiner, dismissing the appellant's appeal from an earlier decision of the Manager of the Fillmore Grazing District rejecting certain grazing uses for which appellant had applied.

Affirmed.

Grazing Permits and Licenses: Appeals

Dismissal of an appeal concerning the location of an allotment division boundary line will be affirmed where the record shows that the establishment of the line has been known to the appellant, neighboring ranchers, the District Advisory Board and the Bureau of Land Management for many years and all except appellant have recognized and accepted it, and appellant's right to graze beyond the line has never been officially sanctioned. Appellant may not use the annual adjudication of his grazing application as a vehicle to carry forward on appeal a grievance of long standing which is barred by 43 CFR 4.470(b).

Grazing Permits and Licenses: Adjudication! ! Grazing Permits and Licenses: Appeals! ! Grazing Permits and Licenses: Exchange of Use

Where a District Manager's decision granted an application for exchange of use of grazing lands conditioned upon the applicant's securing a range line agreement from the

other affected range users, an appeal asserting that said decision is arbitrary and capricious or an abuse of discretion will be dismissed where appellant's evidence does not so demonstrate.

APPEARANCES: A. Ladru Jensen, Esq., and Udell R. Jensen, Esq., for the appellant; Reid W. Nelson, Esq., Assistant Regional Solicitor, Salt Lake City, for the Bureau of Land Management; Dale M. Dorius, Esq., for Intervenor Clyde L. Dorius; Eldon A. Eliason, Esq., for Intervenors Nord Memmott, Alan Mathews and Noel Robins. Each of the remaining intervenors appeared pro se.

OPINION BY MR. STUEBING

We will first endeavor to encapsulate the long, involved background which provides the setting for this case.

On March 6, 1970, the BLM District Manager at Fillmore, Utah, issued a decision rejecting Evart Jensen's application for 1970-71 grazing privileges which the manager found to be in excess of his prior privileges, in excess of his federal range qualifications, and outside the boundary of his established allotment. The decision also held that Jensen might obtain approval for exchange of use of leased state sections in a neighboring allotment (Lund's) if Jensen secured range line agreements with other qualified users in the area. Jensen appealed from each of these holdings.

The Administrative Law Judge, without a hearing, granted the Bureau's motion to dismiss the appeal as to the appellant's designated area of use and the amount of his range entitlement, holding that these issues had been finally adjudicated in a prior decision dated April 11, 1967, from which no timely appeal was taken and were therefore barred by 43 CFR 1853.1(b) (1971). ^{1/} The Judge did agree to hear the appeal on the issue of the exchange of use of the leased state lands.

However, Jensen immediately appealed to this Board from the Judge's dismissal of his appeal as to the issue concerning his designated area of use.

This Board found that the Manager's decision of April 11, 1967, relied upon a range line agreement executed by Jensen and two other grazing licensees, Johnson and Dorius, on March 15, 1967. By our decision styled Evart Jensen, 5 IBLA 96 (1972), we held that Jensen's execution of this agreement and the map depicting the

^{1/} Since recodified as 43 CFR 4.470(b).

division line agreed upon established only the north! south division line between the Dorius allotment and the Jensen/Johnson allotment, and did not evince Jensen's agreement to accept the western boundary of his allotment as depicted on the map. The 1967 decision of the District Manager did not define the western boundary of the allotment, and, therefore, neither the range line agreement nor the 1967 decision constituted a final determination of the western boundary so as to preclude the issue from this appeal. However, the condition of the record was such that we were unable to ascertain whether the western boundary of the allotment had been fixed by any other prior or subsequent adjudication which would serve to bar that question from the present appeal.

Accordingly, by our decision of March 6, 1972, supra, the case was remanded for a determination of the issues, including the exchange of use issue reserved for hearing by the Judge.

The case was heard by Judge Steiner during two days in May 1972 at Fillmore, Utah. Eight ranchers in the area were recognized as intervenors, but the motion of the Town of Scipio to intervene was denied. The hearing record consists of nearly 400 pages of transcribed testimony and 47 exhibits. Upon the conclusion of the hearing, the Judge announced that he would grant the joint motion of the Bureau of Land Management, and the intervenors to dismiss the appeal. Subsequently, on October 6, 1972, the Judge issued a written order of dismissal in which he held: (1) that appellant had failed to establish that the rejection of his application for exchange of use was arbitrary, capricious or an abuse of the District Manager's discretionary authority; and (2) that appellant had failed to establish entitlement to use of those public lands lying west of the crest of the high ridge which has been treated as the western boundary line of his allotment.

We agree with the Judge's findings and conclusions.

With reference to the exchange of use sought by appellant, the land lies within the Lund allotment, outside Jensen's area of use. The District Manager had not forbidden such an exchange of use, but rather had held that it could be authorized only if Jensen could secure an appropriate range line agreement with the other range users in the area. The imposition of this condition was in accord with the recommendations of the District Advisory Board and was fully within the discretionary authority of the District Manager. 43 CFR 4115.2-1. Appellant presented no evidence which sustains his contention that the Manager's holding was not a reasonable and responsible one.

The major portion of the hearing was devoted to the question of the location of the western boundary line of appellant's allotment. The Bureau and the intervenors asserted that it was the

crest of the high ridge which forms the divide between the Scipio drainage, to the west, and Japs Valley, to the east, where appellant's allotment is situated.

Appellant contends that there is an area west of the crest, on the western slope, where his sheep have ranged naturally since 1946. This area varies from three quarters of a mile to as much as two miles beyond the crest. He testified that no one else used this area, that livestock owned by the stockmen in the Scipio Valley did not come up that high, but that his sheep, having attained the crest from the east, tended to graze on over to this portion of the western slope. He stated that he could, and did, haul water to the sheep, but that it would not be possible for the Scipio Valley ranchers to haul water from the western side to the same area.

Pratt Allred, who was the District Grazier under the old Grazing Service, and who subsequently became District Manager when the Bureau of Land Management was created, had managed the district from 1942 to 1962. Allred testified that he was aware that Jensen's sheep were grazing west of the ridge line, and that he had received some complaints about this from neighboring allottees. He recalled that Jensen had obtained the grazing privileges of Roy Mellor, deceased, from the Mellor estate, and at that time the Mellor allotment was recognized as running to the top of the ridge. He identified Government Exhibits Nos. 1 and 2, which are decisions, signed by Allred and addressed to Archie Mellor and Roy Mellor, respectively. These are each dated September 11, 1944, and describe the Mellor area of use in the Sanpete Unit. In these decisions, the western boundary is clearly described as beginning at a certain point on "the divide of the Japs Valley and Scipio drainage, thence North along the divide * * *." Allred further testified that he does not recall making any changes in that boundary, although he did subsequently allow Jensen to use state lands west of the crest which Jensen had leased.

The Bureau also established that the east boundary for the Scipio allottees was also fixed at the crest of the ridge, and had been for many years, so that a use of the western slope by appellant had to constitute an incursion into the neighboring allotments.

Further, during part of the year appellant grazes an area (Pasture A) in common with Clyde Dorius, one of the Intervenor. Dorius' attorney, arguing in support of the motion to dismiss the appeal, stated that Dorius never felt that he had any grazing privileges which extended beyond the top of the ridge, which he regarded as the west boundary of Pasture A.

Jensen himself testified that he first learned that the ridge line was supposed to be his westernmost boundary in 1964, when he

happened to observe a map being prepared in the BLM District Office, since which he says he has "continuously written them letters protesting that line on top of the mountain" (Tr. 176). On June 24, 1965, he appeared before the District Advisory Board and submitted a long written protest against the establishment of the line at the crest of the ridge. He testified that one member of the Board favored allowing him to continue grazing west of the crest, but the majority insisted on recognition of the line as the top (Tr. 210-211). However, he said there was no vote taken (Tr. 214). He also testified that the Advisory Board considered the question of the boundary line in 1966 and that "there have been a number of [such meetings]" (Tr. 240).

Nyles Humphrey, a Bureau employee who served as range manager in the Fillmore district from June 1958 until August 1963, testified that during that period the boundary was treated as the top of the ridge, and that he recalled no change in that line.

Warren Brough, the Fillmore District Manager since 1964, testified that he has always interpreted the various range line agreements as establishing a division line along the high ridge, as shown by Exhibit 16, at least to the extent of the area in dispute. He also verified that the crest of the ridge served as the eastern boundary of the abutting allotments in the Scipio drainage, i.e., the allotments of Intervenor Memmott, Ivie, Mathews and Robins. He stated that during his term of service in the Fillmore District there had been no change in this boundary. He stated that any sheep use of the west slope of the ridge would be regarded as trespass. He said he had not attempted to secure a range line agreement between the users on the east and the users on the west side because he saw no need to, as the boundary was already established.

From this record we conclude, first, that appellant has long known that the Bureau, the District Advisory Board and the neighboring ranchers have all treated the crest of the ridge as the division line. He is, therefore, precluded from using the District Manager's decision of March 6, 1970, as the vehicle to carry this appeal forward. Next, we conclude that he has never had any official basis for believing that he had grazing rights on the western slope. The boundary has never been fixed where he asserts that it should be by any adjudication. The many allegations made by appellant in support of his right to grazing privileges beyond the officially established allotment boundaries are without merit.

During the pendency of this appeal, appellant filed a petition to supplement the record with the finding of the District Court of Millard County, State of Utah, in Jensen v. Dorius, Civil 6094 (filed July 6, 1973). The Bureau filed a motion in opposition. We find that the material is outside the issues with which this case is concerned, and we deny the petition.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Edward W. Stuebing
Member

We concur:

Joan B. Thompson
Member

Anne Poindexter Lewis
Member

